No 10410

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GRIFFITHS DAIRY, INC.,
Appellant.

vs.

CLARK SQUIRE, as Collector of INTERNAL REVENUE,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant

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STATEMENT OF JURISDICTION.

This action seeks to recover from appellee, documentary stamp taxes alleged to be unlawfully assessed amounting to $1235 plus penalty and interest of $170 paid or to be paid appellee, or such lesser sum as the court should decide recoverable. R. 2, 8, 9, 11, 16.

Request for Abatement and Petition for Refund were made April 5, 1941. Objection to the tax was made before and after assessment of it. R. 16.

Written agreement to pay the above sum was made under protest March 24, 1941, of which $120 was then paid and over $700 in all has now been paid. R. 16, 17.

The complaint is practically admitted by the formal answer. Its allegations are substantially set out in the Findings of Fact. R. 13, 17.

The case was tried by Honorable Charles L. Leavy March 10, 1943.

The court found that stamp tax A, as classed herein, should be reduced from $55 to $37.50. R. 17.

But that stamp tax B of $1100 and stamp tax C of $80 were lawfully assessed. R. 18. Findings of Fact and Conclusions of Law were made and complaint dismissed with costs, March 18, 1943.

April 9th appellant filed Notice of Appeal with cost bond. R. 21.

Designation of Errors and Designation of Record were served and filed. R. 22.

The case was docketed in this court April 26, 1943. R. 25.

Jurisdiction for this case and appeal is under section 1802 (A and B) Internal Revenue Code, as amended, and 28 U. S. C. A., Section 41. 26 U. S. C. A., page 41-321-2. Section 3772 Internal Revenue Code. 28 U. S. C. A., Section 225.

STATEMENT OF THE CASE

Appellant, a dairy corporation, brought this suit against appellee as Collector of Internal Revenue to abate, refund, or recover $1235 plus interest and penalty of $170 for documentary stamp tax, paid or payable, illegally assessed against appellant (1st) on no par value stock subscription, (2nd) on 22,000 of such shares given unrestrictedly to the corporation, or as stated by the court, "on" the alleged "transfer of the right of the original subscriber, to receive such shares donated to the corporation treasury," and not issued to him, and (3rd) on later transfer of part of such donated stock; and which sums were agreed under protest to be paid $120 monthly, and thereunder more than $700 has been paid; or to recover such lesser sum as the court should adjudge an unlawful assessment, and to determine the value of the stock. R. 9.

Appellant contended the stock had no market value and only nominal value of $100 and that all over that sum paid or agreed to be paid was illegal exaction. R. 8, 16. The dispute has been the lawful amount.

The capital stock of appellant was $50,000, being 50,000 shares no par value, payable in dairy property and routes, estimated worth about $60,000, subject to debts payable by appellant of about $35,000.

This action, then, is to adjudge the valid documentary stamp tax against:

A. Original subscription of 50,000 shares, of which only 28,000 were issued, and which subscription was taxed $55. R. 15, 17.

B. A "donation" of 22,000 shares of the subscribed stock to appellant, and which gift, or the assumed "transfer of the right of Griffiths to receive these shares," was taxed $1100. R. 15, 18.

C. The 1600 shares later issued by appellant from said donation, taxed at $80. R. 15, 18.

Appellee added penalty and interest of $170, in all $1405.

The case comes within section 1802 of Internal Revenue Code as amended.

The main facts are: Griffiths, Jr. and wife owned a dairy business. They estimated it worth $60,000 subject to debts of about $35,000. They were advised their credit would improve if they incorporated. The Federal R. F. C., from which they expected a loan, so counselled them. Creditors promised to take stock on their debts; employees said they would take stock while employed by the corporation. R. 3, 5, 13.

Accordingly, July 5, 1940, appellant incorporated.

The stock was paid by dairy property estimated at $60,000, of which $24,000 represented milk routes, appellant to pay the debts. R. 3, 13.

Griffiths and wife subscribed for 48,000 and one Parry who was working for Griffiths subscribed 2000 shares.

Griffiths donated appellant 22,000 of those he subscribed for.

The donation was "And the remainder of this said stock, being 14,000 shares of preferred and 8000 shares of common stock, shall be and remain in the treasury of said corporation as and for its own property, fully paid and non-assessable, to be later sold for the sole use and benefit of the corporation and for such sum or sums as the Board of Directors may from time to time decide and order." R. 14.

None of the donation has been transferred except 1000 shares to reduce the debt of Clothier $1000 and upon the understanding that appellant buy dairy supplies from Clothier, and 600 shares to Sell on condition that he be employed by appellant, and when he ceased such employment, appellant take back the shares for $600. R. 13, 15.

Said 22,000 shares were not issued to Griffiths and returned to appellant. The gift stock was to be issued any time, at any price, to anyone, at will of appellant. There was no nominee or direction or control of this stock by Griffiths. R. 14.

Parry's subscription was on account of debt due him as employee and assumption he would remain employed.

The stock had no market value, only restricted or nominal value.

Further, Griffiths and wife were virtual owners of appellant. The corporation failed in its purposes. It was a family concern. The transaction, excepting Parry, Clother and Sell, was giving property for shares representing the property, all in the family.

POINTS

First. Appellant's chief position, bone of the case, is the illegal exaction of $1100 upon said donation.

Nevertheless, if any tax on said donation be valid, then appellant contends that the lawful basis of such tax was its market value, and there being no market value, then its real value for tax purposes would be nominal, or such value as considered judgment would attach to this stock in the light of attendant circumstances.

Second. It is next maintained that the right tax basis on 50,000 shares subscription, was a nominal value instead of $1 per share on which the tax was based, amounting to $55.

Third. That the right tax basis on 1600 shares issued from said donation, was nominal and not $1 per share on which the tax of $80 was based.

In any event, appellant maintains there should be no gift tax or, as stated by the court "On the transfer of the right of the original subscriber, Griffiths, to receive the 22,000 shares of stock donated to the treasury of plaintiff corporation," and that the $1100 tax was arbitrary exaction and not taxation of property.

The evidence is omitted because of much cost and because appellant deems the facts found by the Trial Court do not sustain the Conclusion of Law, especially No. 3 which validates the $1100 tax on the naked gift stock, and because this conclusion is contrary to law.

The Trial Court in third Findings of Fact followed closely the foregoing outline:

FINDINGS OF FACT

"Plaintiff corporation was organized in the manner following: Austin E. Griffiths, Jr. and his wife were for many years, prior thereto, the owners, as a Washington community, of a dairy business in and about Seattle, Washington, known as the Griffiths Dairy, which going business had assets comprised of eleven milk routes, trucks, cans, furniture and other dairy equipment of an estimated value of $60,685. The business at the time of incorporation owed debts on account of the operation of said business in the amount

of $34,780. Said Austin E. Griffiths, Jr., was advised by officers of the Reconstruction Finance Corporation, from which Corporation he expected to obtain a loan, to form a corporation by turning over to the Corporation all of the assets of said dairy business. That it was decided to form a corporation to take over the said dairy business for the above purpose as it was thought that the said business might be carried on more advantageously if additional capital was received and particularly if prior creditors of the said business would take stock in full or part payment of their claims. Also that employees would become more interested in plaintiff's business if they became part owners thereof by taking stock therein. No persons, however, subsequent to the incorporation, bought shares of stock in the plaintiff corporation, except as hereinafter stated. There was transferred to M. Clothier 1,000 shares of treasury stock in part payment of a prior debt, and 600 shares to Donald Sell, who was to be employed by plaintiff and when he ceased to be so employed, then his shares to be taken back by plaintiff. The plaintiff corporation was incorporated on July 5, 1940, with an authorized capital of $50,000. represented by 14,000 shares of no par value stock, classified as preferred stock, and 36,000 shares of no par value stock, classified as common stock. Said Austin E. Griffiths, Jr., his wife and Byron T. Parry were the sole incorporators and the sole and first directors and officers thereof. Parry's stock was

in payment of a prior debt or bonus due him. In an offer made to the Board of Directors of plaintiff corporation by Austin E. Griffiths, Jr. dated July 9, 1940, and accepted by the plaintiff corporation in its corporate minutes, assets having an estimated value of $60,685. were conveyed to the plaintiff corporation by Austin E. Griffiths, Jr., in payment of the entire 50,000 shares of stock which was subscribed for as follows: Austin E. Griffiths, Jr., subscribed for 39,000 shares, Ragna S. Griffiths, his wife, subscribed for 9,000 shares, and Byron T. Parry subscribed for 2,000 shares, which stock had an actual value of $25,000. However, certificates covering only 28,000 shares of the 50,000 shares subscribed for were issued to Austin E. Griffiths, Jr., Ragna S. Griffiths and Byron T. Parry, and the remainder of this said stock being 14,000 shares of preferred stock and 8,000 shares of common stock, were donated to the plaintiff corporation by Austin E. Griffiths, Jr. to be and remain in the treasury of said corporation as and for its own property, fully paid and non-assessable, to be later sold and delivered for the sole use and benefit of the corporation and for such sum or sums as the Board of Directors may from time to time decide and order. Subsequently, as aforesaid, 1,000 shares and 600 shares of the treasury stock so donated were sold and transferred from the treasury of the plaintiff corporation to M. Clothier and Donald Sell, respectively." R. 13.

SPECIFICATION OF ERRORS

No. 1. Conclusions of Law 2, 3, 4 and 5 are erroneous, not supported by the Findings of Fact.

No. 2. Conclusions of Law 2 and 4 are erroneous because appellant is charged with more than a nominal tax on all the stock, and in excess of $100 originally paid.

No. 3. Conclusion No. 3 is especially erroneous because in law there is no stamp tax upon said naked donation, or as it is phrased "on the transfer of the right of Griffiths, Jr. to receive the 22,000 shares of stock donated to the treasury of the corporation" and therefore the $1100 tax is void.

No. 4. The court erred in rendering judgment against appellant dismissing complaint with costs.

SUMMARY.

1. Appellant maintains that the Findings of Fact show that due to conditions attending this incorporation and stock payment by property of uncertain value and subject to debts, there was no fixed or market value for it, and therefore, the stock value would be nominal which appellant has affirmed should not exceed $100. That the character of the incorporation stock purchase and payment, especially required appellee to obey the statute and to ascertain the "actual value" of the shares to which the unit of $20 or frac-

tion thereof" applied, and therefore appellee was wrong in assuming an arbitrary value of $1 per share and making an assessment upon that basis.

2. Appellee valued each share $1 and on that basis taxed Class A subscription $55 and Blass B—gift of 22,000 unissued shares from stock subscribed, $1100, and Class C 1600 shares later issued by appellant from the gift stock to creditor Clothier and employee Sell, $80.

3. The Trial Court found because of $35,000 debts, the stock could not be valued above $25,000 and reduced the tax of $55 on Class A stock to $37.50, but refused to reduce the taxable basis of Class B and C shares.

Appellant contends appellee's valuation disregarded the statute which requires the "actual value" of this stock to be found, and that the court should have reduced B and C class shares at least to his valuation of Class A. It is the same stock, same company, same market. No one would take it except creditors or employees moved by their special interests.

Moreover, all stock was paid for by Griffiths and wife. The only subscribed stock issued was 600 shares to them, 2000 shares to Parry, an employee, and these three were sole incorporators and officers.

The unissued 22,000 shares were given by Griffiths to the company without nominee or direction for its disposal.

Later, the company issued Class C shares to creditor Clothier and worker Sell and their 1600 shares were taxed $80.

4. The only question as to A and C stock is basis of their valuation, which having a nominal value because of limited or no market should be taxed accordingly.

5. But Class B gift shares $1100 tax should be held void.

6. The gift stock, according to appellee, has been and will be taxed three times; its part of subscription tax of $55 or $24.20; second, as a gift $100; third, when later issued to Clothier and Sell, $80, and the remainder, 20,400 shares, whenever issued, $1020.

Thus appellee charges it a direct tax of $2200 plus part of the $55.

If Griffiths had kept it and sold it to anyone later, it would have been taxed, of course, again, but only twice.

Although this stock was not issued to Griffiths, who could have taken it with no added expense, it was as a gift assessed higher than if it had been so issued and later sold by him to anyone else. If Griffiths had taken it and later transferred it to a "custodian" it would not be taxable.

In brief, this stock to be taxable, should be actually issued or authorized to be issued.

On the contrary, Griffiths gave it as a part of the formation of the company. The right was given before stock was created. Without it there would have been no company. Griffiths having given it had nothing left "to receive."

The collector's action, appellant respectfully submits, is not warranted by any law, and is confiscation.

ARGUMENT.

The controlling statutes are sections 1800 and 1802, Internal Revenue Code as amended. The 1940 act passed just before appellant was formed, lifted rates to those applied.

STATUTES

See also Treasury Department Regulations 71 for 1932 and 1941.

See also Treasury Department Statutes, Regulations 71 for 1932 and 1941.

The following parts apply mainly to stamp tax of no par value stock, issues and transfers.

Section 1800. *** There shall be levied, collected and paid, for and in respect of the several *** certificates of stock *** and things mentioned in Schedule A of this title, or for in respect of the *** paper which such instruments *** or things *** are written, by any person who makes, signs, issues, sells *** the same, or for whosce use or benefit the same are made, signed, issued, or sold ***, the several taxes specified in such sections.

CAPITAL STOCK ISSUES

Section 1802-A: Capital stock *** issue: On each original issue *** by any corporation *** holding or dealing in any of the stock mentioned in this sub-section or section 1801 *** on each $100. of par or face favlue *** of the certificates issued by such corporation *** (or of the shares where no certificates were issued) 11 cents: Provided, That when such shares or certificates are issued without par or face value, the tax shall be 11 cents per share *** unless the actual value is in excess of $100. per share, in which case the tax shall be 11 cents on each $100. of actual value *** of such certificates (or of the shares where no certificates were issued) or unless the actual value is less than $100. per share, in which case the tax shall be 3 cents on each $20. of actual value, or fraction thereof, of such certificates (or of the shares where no certificates were issued).

(Regulation Article 25 says: "Stock is deemed issued when *** the subscription is accepted).

(Article 27 says: "Where a certificate represents more than one share ***, the actual value of the certificate *** issued without par or face value is the measure of the tax and not *** the actual value of each separate share which the certificate represents.

"Where shares are issued without certificates, the par or face value or the actual value (as the case may be) of each share is the measure of the tax.

"The tax, on original issue, is measured not by the amount paid in, on, or for the stock, but by *** the actual value in the case of stock without par or face value.

"In the case of stock without par or face value, the actual value of the stock is to be determined by the market price at the time of issue)."

STOCK SALES AND TRANSFERS

Section 1802-B: Capital stock *** sales or transfers: On all sales *** of, or transfers of legal title to any of the shares or certificates mentioned in section A, or to rights to subscribe for or to receive such shares or certificates, *** 5 cents, and where such shares or certificates are without par or face value, the tax shall be 5 cents on the transfer or sale *** on each share ***: Provided, That in case the selling price, if any, is $20. or more per share, the above rate shall be 6 cents ***. (Several exemptions are here omitted.).

Provided, further, That *** every bill or memorandum of sale *** before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. (Then follows penalty for tax non-payment by any person).

(Regulation Art. 31 says: *** "The tax accrues at time of making the *** transfer of the legal title to *** receive such stock, regardless of the time or manner of the delivery of the certificates or agreement or memorandum of sale).

Our position is, first. That the gift tax is not covered by the statute; should not be construed to be covered. Congress should not be presumed to intend such an unnecessary, unseemly tax upon lawful business, a tax exceptional, prohibitive, destructive of the source it lives on. In this instance this small business was throttled at the start by this unexpected, excessive tax.

Second. If the gift tax be valid, then the basis on which the amount of the tax is computed should be actual or nominal value.

Third. If the gift tax, or the Griffiths right to receive these shares tax, be valid, then the basis, even if assumed to be face value of $1. per share, should be $20. unit into 2200, or 1100 units at 5c each, or in all, $55.

Appellee taxes the gift stock under paragraph B of section 1800 without reference to paragraph A. of this section. Appellee used the unit $20. as to the subscription tax only. It is appellant's contention that in the matter of stock sales and transfers under paragraph B, the kind of no par stock or sales to be taxed is described and defined in paragraph A. Paragraph B applies to shares described in paragraph A and is controlled by that paragraph in reaching the amount of tax.

It is said in B that the taxes on the shares "described in A" shall be ***. As to par stock, the unit $100. is used, but as to no par shares, the unit $20. is not carried forward. The whole section should be construed together and the unit or devisor $20. used in both paragraphs A & B. In that case the unit $20. divided into 22,000 shares would yield 1100 units, which at 5c per share unit would yield $55. in tax instead of $1100.

Fourth. Appellee first assessed the gift as follows: "Donation or transfer of 22,000 shares to treasury, $1100." Later the court called it a tax on "The transfer of the right of the subscriber to receive the 22,000 shares" so donated.

But in any case, there is wrongful, double taxation of the same matter. Its share of the subscription tax is $24.20. Then while at rest, without business movement, it is taxed $1100.

Regulation 71, Article 25, says: "Stock is deemed issued when subscription is accepted." If that is so, then when Griffiths subscribed for this stock, it was issued to him. Why, then, having paid $24.20 for subscription tax, should this gift bear a further tax of $1100. upon his alleged transfer to the company of his right to receive these given shares?

Fifth. The court on class A stock issue fixed the basic value at $25,000. instead of $50,000. as perfunc-

torily assumed by appellee. The tax on the whole subscription was $20. into $25,000. or 1250 units at 3 cents, or $37.50.

Appellant contends, as above stated, that section 1800 A and B should be considered together. In that case the tax on all of the gift shares when sold would be at 5 cents per share or $62.50, and on class C 1800 shares sold, only $4.50 instead of $80. imposed by appellee.

It would result from this computation that the total lawful tax should be $42. and adding gift tax of $55. then $97. and not $1,235.

The Regulations refer, it is submitted, to ordinary active stock transactions, not to a matter that starts the corporation.

Regulation Art. 25, Section 113 says: "The issue of rights to subscribe for unissued stock" is not taxable.

Regulation Art. 77 says: "The tax is computed upon the full consideration for the transfer less all encumbrances which rest on the property before the sale and are not removed by the sale." In the present case a debt burden of $35000. rested on 50,000 shares.

AUTHORITIES

Counsel has been unable to find a case in point on all aspects of this one.

Upon the question of liability to pay, appellee in the Trial Court relied upon the following and kindred cases.

Appellant maintains these cases, when examined with reference to their facts, do not sustain appellant's action, particularly the $1100. assessment upon the donation.

Raybestos-Manhattan Co. vs. U. S. 296 U. S. 60. 56 S. Ct. 63. 80 L. Ed. 44.

In this case two of the corporations which formed a third directed assignments of their stock to their past stock holders. No gift was involved. This direction, the court held, was the same as a transfer from the old corporation.

But in the case at bar, the right to the 22,000 shares was a gift, no direction was given to issue it to anyone. No privity of contract was retained.

Founders General Corporation vs. Hoey 300 U. S. 268. 57 S. Ct. 457. 80 L. Ed. 639.

In this case the tax payers authorized their nominees to receive the stock. The subscription tax was paid or admitted, but the later or second tax on the shares when issued to the nominee, was disputed.

In the above case the stamp tax was only paid twice; once when the subscription was paid, second, when the stock was issued or directed to be issued to the nominees.

In the pending case, the subscription tax is admitted, except as to basis and amount. But here, appellant is required to pay three times on the same stock; once when subscribed, which is right, second when donated to the corporation, which is wrong, and third when later sold to anyone.

Actually, appellee exacts $1100 on shares not issued, and later would collect $80. on 1600 shares issued to Clothier and Sell, and would collect another $1100 whenever the residue of the gift were sold.

In the cited and related cases, it will be observed there was no treasury stock, no gift to the corporation, no double tax on any donation, and a later tax on an issue therefrom. There was only the issue tax and another tax incurred when the stock was issued to specified stock holders of the old corporation or to designated nominees of the real owners of the stock.

Briefly, the Raybestos case holds that when at the instance of one entitled to receive stock, the certificates are at his request and for his convenience issued by the corporation in the name of a nominee who receives no beneficial interest thereon, the transaction involves a transfer by the beneficial owner which is taxable. Here it will be noted there was a completed transfer from one person to another.

In the Founders case the court says: "The legal title to the shares was received by the nominee from the newly formed corporation; but the authorization rendering his holding lawful was received from the tax

payer. The legality of the issuance of the stock in the names of the nominees rests on the fact that the tax payers authorize such issuance and granted their nominees the right to receive the stocks entered in their names. The grant of that authority is a transfer of 'The right to receive within the meaning of the act.'

Notwithstanding some broad dictum in the foregoing cases, it is clear their facts are essentially different from the instant case and that the right to receive passed, directly or indirectly, from one to another, the corporation being a medium of the transfer. There was no unqualified gift to the corporation.

It is believed the following authorities support appellant's right to recover.

White vs. Consolidated Equities, 78 Fed. 2d. 435.

Herein it is held no double taxation of shares is lawful. There must be definite purchase of stock. The stamp tax law is not to be strained.

Corporation of America vs. McLaughlin, 100 Fed. 2d. 72, 78.

Maloney vs. Portland Associates, Inc. 109 Fed. 2d. 124.

Intercoast Trading Co. vs. McLaughlin, 18 Fed. Supp. 149.

This case deals with the taxable value of stock. This is a question of actual value under the circumstances of the corporation involved. The court set aside a treasury regulation as being contrary to fundamental facts.

W. T. Grant Co. vs. Duggan, 94 Fed. 2d. 859.

This case, like the McLaughlin case, had to do with no par stock. It was ruled that stock value could be proved by its market value. This case indicates the care that should be taken in stamp tax values, whether upon certificates or shares.

Commercial Credit Co. vs. Tait, 2 Fed. 2d. 862. Affirmed - 7 Fed. 2d. 10222.

Held that no par value stock depends for stamp tax purposes upon the facts and circumstances of each corporation issuing it. And the Court justly ruled that tax confiscation is not due process of law guaranteed by the Fifth Amendment.

Merchants National & Savings Bank vs. U. S. 101. Fed. 2d. 399.

Held stock not taxable because not on an independent transfer from one person to another.

Seattle First National Bank vs. U. S. 33. Fed. Supp. 603.

Held no taxable transfer. And that Treasury rules should be reasonable and that collector should use care and caution.

Rogers vs. Strong, 72 Fed. 2d. 455.

Herein "Fair value" of stock is held to be reality rather than stock exchange quotations.

Orpheum Bldg. vs. Anglin, 127 Fed. 2d. 478, 485.

Herein it is held judgment or care must be used by the collector in stock valuation and that there must be some sort of complete transfer in order to warrant a tax.

It is respectfully submitted that appellant is entitled to the redress the law allows when it appears that a tax has been "Unjustly assessed or is excessive in amount, or in any manner wrongfully collected."

WHEREFORE, appellant prays for reversal of the judgment complained of and for such other judgment as may be just and lawful.

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